No. 1808

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

ANDREW ANDERSON et al.,
Appellants,

vs.

J. J. MOORE & COMPANY
(a corporation),
Appellee.

REPLY BRIEF FOR APPELLANTS.

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CRITICISM OF APPELLEE'S STATEMENT OF FACTS.

A comparison of the statement of the facts in the two briefs in this case will, we believe, not be disadvantageous to the appellants. Appellee's statement comes far from being an impartial one and greatly exaggerates the existing situation at the time. In our opinion the "extraordinary" aspect of the conditions prevailing lies not in the contract for the sale of the coal having been made "over a year before" and the charter "six months before", the change of conditions in "territory tributary to the San Fran-" "cisco market", the "unforeseen financial depres-

sion" (coming after the great disaster of 1906) and the "glut" of coal, but in the fact that the "Columbia" was detained for 67 days in San Francisco in order to meet the business convenience of J. J. Moore & Company and the Western Fuel Company. Unquestionably no prudent shipowner would have chartered his vessel with any such detention in mind. Unquestionably also the right to so detain the vessel was not in accord with the intention of the parties at the time the charter was made. The question, therefore, is whether the terms of the charter party *require* such a construction, and we submit that the court should not attribute such a result to any *doubtful* terms.

Counsel overstates the conditions which existed. The evidence is uncontradicted that an unprecedented amount of coal was brought in during the period in question:

> "Q. Is it not a fact, Mr. Mills, that the imports of coal into San Francisco from Australia during the last half of 1907 and the first half of 1908 were unprecedented?
>
> A. Yes, sir, I think there was a larger amount come in during that time, that is, as far as my memory serves me."
>
> (Mills, 92, 93.)

> "Q. Was the amount of coal that you ordered and came in on those vessels at that time an unusual or extraordinary amount for you in your business to import?
>
> A. Of late years, yes. Since the discovery of oil, the importation of coal has not been so heavy until two years ago.

Q. Then there was an increase in the quantity of coal?

A. A large increase in the importation of coal.

Q. What was the reason for that?

A. Principally because they could not get cars to bring coal from the East. We were shipping coal into Nevada and other places where we never shipped before. Oakland, San Francisco and other places that did get coal from Wyoming did not get any coal during the shortage of cars."

(Moore, 58.)

As is well known and as this evidence shows San Francisco was, after the disaster of April, 1906, shipping coal to "places where we never shipped before" and needing more itself because of the shortage of cars which usually brought coal *from the East*. Mr. Moore's further statement (p. 58) that he thought the shortage existed prior to the earthquake is of little weight and the fire conditions undoubtedly *increased* the shortage (Id.). The result of these conditions was the ordering of an *unprecedented* amount of coal by the respondent and others and the making of sales a year in advance. Is it fair to say that a *continuance* of these conditions was necessarily to be expected or that Nevada and Arizona would *always* lack cars to bring them coal from the East? Is it not much more reasonable to say that, with the amelioration of conditions in San Francisco, the cars could be used for other places and the shortage of coal in the tributary territory would grow less? Also, was it not fair to presume from the conditions that there would be a "financial

depression"? We submit that the conditions in San Francisco at the time the "Columbia" arrived cannot be considered as "unforeseen", and that the burden of meeting those conditions should fall on the parties who brought about the congested state of the coal market and not on the innocent shipowner. The coal dealers who ordered this excessive supply of coal (and it is to be noted that Mr. Moore says: " We did not import *one-quarter* of the coal that " came into the harbor" [54]) are, in our opinion, the persons who caused the congestion, and they should have foreseen the result of their scramble to take advantage of an inflated demand for coal and the consequent high prices.

In order to meet the contention that J. J. Moore & Company were not responsible for the delay in the case of the "Columbia", counsel argues for *January 1st* as the date of the beginning of the congestion (for the obvious reason that most of respondent's cargoes came in *before* this time). In support of this remarkable theory he refers to Mr. Moore as saying that the congestion "had been continuing *several weeks*" prior to the "Columbia's" notice of readiness and to the fact that the "Jethou" and "Riverdale", which were consigned to respondent and arrived before January 1st, discharged within their lay days. The argument is wholly unsound. What Mr. Moore in fact said was that at the time of the "Columbia's" notice "the coal bunkers were all " about *three to four or five weeks behind time*" (52). This conclusively shows that the congestion

began long prior to January 1st and is capable of no other construction. The bunkers could not be even two weeks "behind time" at that date because of the few arrivals between January 1st and 18th, much less four or five weeks, especially when we consider their magnificent discharging capacity on which counsel has laid such stress. The congestion *undoubtedly* had existed for some time and J. J. Moore & Company, who imported something less than *one-quarter* of what came in, were undoubtedly "in the rush which created the congestion" (142 Fed. at p. 415).

As to the instances of the "Jethou" and the "Riverdale", *their* cargoes were not consigned to the Western Fuel Company, but to the Pacific Coast Steamship Company (131). It is noticeable that the cargoes discharged at Oakland and by parties in San Francisco other than the Western Fuel Company were never greatly delayed, whereas, the record shows *no instance* of any vessel at the Western Fuel Company's bunkers which was *not* greatly delayed. This goes far to show that the main congestion was at these bunkers, and that there were numerous other places to which the "Columbia" might have been ordered by the respondent where she could have been discharged within a reasonable time.

This showing completely refutes counsel's claim that *all* the bunkers and stowage places *in the port*

were filled.* It also refutes any argument based on the cases of *Larsen v. Sylvester* and *Pyman v. Mex. Cent. Ry.,* where some special concern controlled *all* the discharging facilities. Undoubtedly there was a general overloading of the port and the other coal buyers had all they could do to take care of their own vessels (though it is to be noted that the cargo on respondent's vessel, the "Craighill", was sold to the Western Fuel Company and was promptly discharged *at Oakland* (131)), and also that this gave the Western Fuel Company little chance to dispose of its coal elsewhere, but the real congestion was at the bunkers of that firm and the respondent substantially contributed to such congestion by its contracts with it, and its importation of coal to other parties which rendered the docks of those other parties unavailable. Is it fair or just, under these circumstances, to place the burden of the loss on the shipowner? Can a charterer, when there are numerous places for discharge available, order a ship to the only place which is unavailable and still not bear the loss?

Counsel lays stress on the statement in our brief (p. 6) that "within four months prior to March 1st" the respondent brought over 45,000 tons of coal to San Francisco, and gives us a list of vessels arriving after *November 1st* showing the arrival of only

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* This claim was based on hearsay testimony by Mr. Moore to that effect. The unreliability of this evidence is shown by the statement of the witness that his information was not that the bunkers were full, but that ships were entering them all the time (53-54). As a matter of fact, the bunkers were often unoccupied by vessels for days at a time (Nelson, 44-45; Mills, 89-93).

26,838 tons. If he had examined the evidence cited in support of our statement he would have seen that we also referred to the "Strathnarin" (6007 tons), "Borderer" (5893 tons) and "Valdivia" (5938 tons), which discharged on October 17th, November 4th and November 13th respectively, which would bring the total up to our claim. Apparently, however, counsel desires mathematical rather than substantial accuracy and "within four months" was not exact enough.

Let us here correct another mistake in our main brief. On page 36 we there referred to the "Camphill" as one of the vessels applying on respondent's contract to supply between thirty and forty thousand tons of coal to the Western Fuel Company. A more careful examination of the evidence shows that this cargo (5500 tons) was supplied under *another contract* (Mainland, 79). We apparently did not get to the bottom of respondent's contracts at the trial. This hint as to other contracts is entirely in line with Mr. Moore's plea that he did not bring in *one-quarter* of the coal which overstocked the port.

Stress is laid on the fact that the custom of discharging in turn is a general one in the port and not merely the custom of the Western Fuel Company, as we have contended. Of course, vessels are naturally discharged in turn but when not a single instance is shown, outside of the vessels consigned to the Western Fuel Company, of a vessel failing to discharge within the lay days, the custom is of little

moment. What we meant in saying that the custom was that of a particular firm was that it only applied to vessels consigned to that firm and not to all vessels arriving. A vessel consigned to Oakland or to the Pacific Coast Company might well have arrived after the "Columbia" and have been discharged before her, and many in fact did. No custom would prevent this. Hence the custom was, as we have said, merely the practice of particular individuals and has no significance whatever (see *9 Encyc. Law,* 240-242).

Stress is repeatedly laid on the testimony of Captain Larsen that the customary place to discharge coal was at the bunkers. This evidence is clearly not meant to be exclusive and we make no further comment on it.

Counsel says on page 9 of his brief that "Mr. " Moore testified that he had *designated* the bunkers " of the Western Fuel Company" as the place of discharge. The charter party required the ship to deliver as "directed", and we again contend that Mr. Moore's so-called designation was a mere casual remark, in no sense irrevocable and hence in no sense a sufficient *direction.* Captain Nelson's inquiries at the bunkers of the Western Fuel Company may or may not show that he knew where his ship was to discharge and are in no way inconsistent with there having been a failure to direct him to any berth. As before pointed out the cargo of the "Craighill" was also sold to the Western Fuel Company, yet she was promptly sent to Oakland.

This seems as good a place as any to deal with counsel's contentions as to when the notice of readiness was given. It is alleged in the libel that such notice was given on January 15th (Par. 6, p. 6), and this allegation is not denied in the answer (see p. 18), though it is denied that the vessel was in fact ready. Counsel is now estopped from claiming that said notice was insufficient and a mere notice of arrival. Besides this the notice in question stated: "Vessel is awaiting your orders, and lay days will "commence as per charter party." This could convey no other meaning than that the ship was ready and there is no evidence that respondent did not so construe it. Again, according to counsel's argument (Brief, pp. 36, 44), two notices were required to be given,—one of arrival and the other of readiness to discharge cargo. But the charter party requires no notice of arrival. But one notice is required, that of readiness to discharge, and we submit that this was very properly given on January 15th when the ship, as far as she was concerned, was ready. To say that under the charter party in suit notice is to be given after a vessel is in the berth which the charterer is to secure for her, and to which he has ordered her, is to require a vain and idle act on the part of the vessel.

In closing his statement of facts counsel refers to the equities of the case, saying that both parties were seriously damaged, the owner losing the use of his vessel and the charterer the interest on his investment. Hence, he says, the losses should rest where

they fall. This is an ingenious way of putting the matter. The "interest on the investment" amounts to a paltry $200.00; the loss of the use of the vessel (according to the presumptive evidence of the demurrage clause in the charter) amounts to over $3,000.00. If "there is nothing essentially inequi-" table in such an agreement", our ideas of equity differ from those of counsel. It is, on its face and beyond dispute, an unfair and oppressive bargain and, unless the charter party *requires* the construction that such an agreement was made, such a construction should not prevail. The presumption is strongly against it.

CONTENTION THAT LAY DAYS DID NOT BEGIN TILL MARCH 15TH.

" After the designation of the dock", says counsel, "there is still much to be done by the vessel her-" self in which the consignee can take no part at " all, before the 'discharge' with its mutual co-oper-" ation of consignee and the vessel can take place." What does counsel mean by "much to be done"? All that had to be done was to proceed from the stream to the dock and with this the consignee had everything to do and the ship practically nothing. The ship was ready, as far as she was concerned, and was absolutely at the consignee's disposal. The consignee in this case could have ordered the ship to numerous places and, to meet his own business convenience, he directed her (if it be held that there was a direction) to the most crowded place he could find.

That his contractual relations with a third party made this necessary is a fact with which the ship had nothing to do; his option was unlimited and the final place of discharge subject to his direction. As said in a citation in our opening brief:

> "It is reasonable and just that the charterer, or the consignee, who has the control of the ship, should take the risk of such delays as are more or less subject to his own directions."

Coming now to counsel's cases, we think we can confidently assert that most of his American authorities are not in point. We have sufficiently commented already on the dicta of Judge Putnam in the Niver Coal case. The two cases cited by him and referred to by counsel as sanctioning delays of 15 and 35 days respectively have only to be examined to show how far they come from the case at bar. In the second case there was an express agreement for loading "in turn" by a specially designated coal company. Counsel says that Judge Putnam's language is quoted with approval by Judge Hale in *Harding v. Cargo of Coal,* 147 Fed. 971. Here is the language of "approval":

> "This comprehensive opinion of Judge Putnam proceeds to give an exposition of the present law upon the subject, and sustains the finding of the District Court in New Ruperra S. S. Co. v. 2,000 Tons of Coal, 124 Fed. 937, where Judge Lowell bases his decision upon the leading case of Davis v. Wallace, supra, in which case it was held that the charterers were liable for the delay caused by the vessel waiting her turn. The business reasons suggested by Lord Esher and referred to in Evans v. Blair, supra,

> have led courts in recent decisions to modify what Judge Putnam has called the 'primitive rule'; but in Ardan Steamship Co., Ltd., v. Andrew Weir & Co., L. R. App. Cases 1905, 501, it will be seen that the House of Lords indicates a tendency of English courts to return to something like the primitive rule. In the present attitude, however, of English and American law, it is difficult to determine in each case to what extent business reasons are competent matters of defense. In the case at bar it is clear that there was something more than a mere 'obligation to load and unload.' There was an obligation that the vessel should have her 'turn in loading', and I have not allowed the usage of the port to be read into the contract, so far as that usage relates to permitting steamers, bunker or cargo, to take precedence of sailing vessels. It is clear that, in this case, exceptional conditions and particular circumstances cannot be a defense, unless they are clearly proved. The burden, then, is upon the claimant to satisfy the court *that it was impracticable to load the Dorothy Palmer at any other pier than pier 10.*"
>
> *Id.,* p. 978.

We suggest that the above, taken in connection with Judge Hale's later decision in the Percy case, falls a little short of "approving" Judge Putnam's dicta. As the decision in the Niver Coal case was in favor of the shipowner, we also fail to see the significance of the fact that a writ of certiorari was refused by the Supreme Court.

In the case of *Dantzler Lumber Company v. Churchill,* 136 Fed. 560, there was a special provision that the lay days were not to commence be-

fore December 18th, 1903, and the question related to a notice before that time. If the remarks cited by counsel be at all in point they are directly in conflict with the law as laid down in *Leonis v. Rank,* and it is apparent on their face that they were made without investigation of the law of the subject unless the reference to "McLachlan, 411", whatever that is, be considered as showing such investigation. The main question in that case was as to a subsequent delay after the vessel's lay days had begun.

The case of *Flood v. Crowell,* 92 Fed. 402, was decided by the same judge who wrote the opinion in the Dantzler case. Here again no authorities are cited and the case is unsatisfactory on this account. The facts, however, show that all the wharves in Galveston were public and subject to city ordinances regulating the assignment of ships to berths, and that these were or should have been known to the parties, who had made many similar contracts. Also the custom of "taking turn" there applied to all vessels in port and not merely to the practice of particular individuals. The charter provided for liability for detention "by the default" of the charterer and it was held that, under the circumstances, there was no such default. The case is, therefore, hardly in point, but we must say that it seems to us to be contrary to numerous cases cited in our main brief construing the words "by the default of the charterer".

Earn Line Steamship Co. v. Ennis, 157 Fed. 941, is in no way in point for the question in that case as

to whether the ship was ready was purely one of fact (see same case on appeal, 165 Fed. 635).

The case of *U. S. v. J. J. Moore & Co.,* 196 U. S. 157, needs no comment.

The citations from Hutchinson on Carriers are admittedly against us, but the only case cited on the first proposition is the Dantzler case, supra, and the second one is based solely on *Tharsis Co. v. Morel* and *Sanders v. Jenkins,* referred to and criticized in our main brief. The citations are mere digests from those cases.

The decision in *Percy v. Union Sulphur Co.,* 173 Fed. 534, is not, as counsel claims, "manifestly based on a subsequent agreement", but that agreement is merely referred to as strengthening the court's conclusion that the terms "ready to discharge" mean simply readiness as far as the ship herself is concerned (see p. 537). It is true that that case may be distinguished upon the ground that there was no express option given to the charterer to name a discharging berth, but, as an implied option would exist in any event, this distinction is a fanciful one. The case is directly in point on the meaning of the words "ready to discharge". Counsel later attempts to distinguish the case of *Williams v. Theobald,* 15 Fed. 465, upon the ground that these last mentioned words were not in the charter though an option was expressly given to the charterer to name a berth. The two cases thus supplement each other, for in the one counsel's theory as to the mean-

ing of the words "ready to discharge" is exploded, while in the other his theory as to the option goes by the board. Any distinction of the one case is met by the decision in the other.

We cannot agree with counsel that the statements quoted on page 24 of his brief from *Tharis Co. v. Morel* are mere summaries of other cases.

Leonis v. Rank has been treated of in our main brief. It is true that it makes a distinction between cases where an express opinion is given to the charterer to name a berth and cases where the option is only implied,—a distinction which we believe to be totally unsound. But upon the question of the meaning of the words "ready to discharge" the case is clearly in our favor. In the case of *Sanders v. Jenkins,* 1897, 1 Q. B. 93, the words used were "Time for delivery to count when the steamer is "ready to discharge", and it was decided in favor of the charterers, but in *Leonis v. Rank* it was clearly held that that case could only be supported as proceeding upon an admission of counsel that the words "as ordered" were to be read into the charter party (see 13 Com. Cases at p. 149; 157). Mr. Carver also recognizes this in the last edition of his work (5 ed., p. 824, Note h). It thus appears that in England the terms "ready to discharge" mean readiness as far as the ship herself is concerned, although by the insertion of the magic words "as ordered" in the charter, thus making express an option which was before implied, the charterer may

yet be protected. This distinction, as we have said, is not grounded on reason and was made necessary solely by earlier decisions.

We submit that the present English rule as to the words "ready to discharge" is in accord with the rule of *Percy v. Union Sulphur Co.* and *Carbon Slate Co. v. Ennis,* while no American case has yet squarely adopted the alleged English rule as to the use of the words "as ordered" (not forgetting the dicta of Judge Putnam in its favor). The case of *Williams v. Theobald* and *Carbon Slate Co. v. Ennis* are squarely opposed to the latter theory. If the Dantzler case and *Flood v. Crowell* be admitted to be in point they are only so as to the meaning of the words "ready to discharge", and on this point they are in conflict with the present English rule and with common sense.

Finally we again desire to call attention to the facts of this case referred to on pages 29 to 49 of our main brief, which, we contend, remove this case from the principle of *Tharsis Co. v. Morel* and the English rule as to the use of the words "as ordered".

CONTENTION THAT DELAY WAS DUE TO A HINDRANCE BEYOND THE CHARTERER'S CONTROL.

Most of the points here made by counsel, both as to facts and law, have been already covered in our main brief or in our reference to the facts in this brief, and but little further treatment is necessary.

Stress is laid on the fact that after January 1st only one other vessel of respondent, the "Camphill", discharged in San Francisco. This leaves out of consideration both the "Riverdale" (131) and the "Lunsmann", but, irrespective of this, respondent cannot excuse itself upon any such ground. It had in part (by an importation of something less than *one-fourth* of the coal which congested the port) caused the bunkers to be at that period "three to four or five weeks behind time" (Moore, 52). Nor is the statement that it brought in "but two shiploads in the previous November" strictly accurate. Four of its vessels were *discharged* in November, namely; the "Borderer", "Valdivia", "Craighill" and "Jethou" (Mainland, 61). We have already sufficiently commented on Mr. Moore's testimony that *all* the bunkers in the port were congested.

On page 30 of his brief counsel refers to a long list of vessels which held back the "Columbia". The dates on which these vessels arrived do not appear, but as the "Camphill" arrived on January 10th and the "Columbia" on January 14th, it is fair to presume that the vessels discharging after the "Camphill" arrived after the "Columbia" and there were at least several of these (Mills, 89, 91). Of course, the *additional custom* of having steamers discharge before sailing vessels is made the excuse for this (but cf. *Harding v. Cargo of Coal,* supra).

We have sufficiently discussed the cases of *Larsen v. Sylvester* and *Pyman v. Mexican Central Ry. Co.*

in our main brief. *Leonis S. S. Co. v. Rank No. 2* is not in point for the reason that the delay was caused by a strike, which was expressly provided against in the charter party, and the court refused to pass on the question whether the delay could be said to be due to "obstructions * * * beyond the con-" trol of the charterers". Hence the length of the delay in that case has no bearing on the delay in this. As for the decision of this court in *Schwaner v. Kerr,* the most that can be said is that it leaves the question open.

The distinctions drawn by counsel between the case at bar and the Niver Coal case and *Schwaner v. Kerr* are mere distinctions of *degree.* The fundamental question is whether it can be said that the respondent measurably contributed to the congestion which delayed the "Columbia". If it did, it is not to be excused under the exceptions of the charter.

We submit that counsel has not met our case on this point and has not sustained the burden of proof cast upon him to show that the so-called hindrance was one "beyond the charterer's control". Exceptive clauses are construed strongly against the charterer and, to excuse himself, he must clearly bring himself within such clauses.

CONTENTIONS IN ANSWER TO BRIEF OF LIBELANTS.

Subheadings C and F of these contentions alone need any further reply except that it should be

pointed out that in computing the lay days counsel forgets February 29th (1908 being leap year).

Subheading C. We merely wish to refer to the citations from *Carlton S. S. Co. v. Castle* and *Evans v. Blair* in this connection with reference to the duty to order a vessel to a berth which she can occupy within a reasonable time. Counsel refers to the decision of the House of Lords in the former case. Lord Herschell there says:

> "It was suggested that there are cases in which particular berths are less favorable than others for loading cargoes, and that where the charterer has the right to name the berth it would be unreasonable that he should name a berth which would prolong the loading to the detriment of the shipowner. That is a question which I do not think is necessary to consider, because considerations would arise in that case which have no place in the present. The difficulty in the present case existed in respect not of a particular berth, but of the entire dock."
>
> *8 Asp. Mar. Cases* (N. S.), at pp. 402-403.

In the case at bar, however, it plainly appears that it was a question of "particular berths" being less favorable than others. It was only at the Western Fuel Company's bunkers that the long delays occurred, and for this reason the language of the lower court cited by us is directly in point. This is clearly shown and this distinction between that case and this made manifest by the following passage from Carver (4 ed., Sec. 624b):

> "In Carlton Steamship Co. v. Castle &c. Co., a ship was to proceed to Senhouse Dock, Mary-

> port, and there load, always afloat, as and where ordered by the charterers. On her arrival in Senhouse dock orders were given for a berth in which she could only partly load, without grounding, unless she waited about a fortnight for the next spring tides. The judges in the Court of Appeal were agreed that the order given ought to be for a berth to which the ship could go within a reasonable time, and there load, always afloat. In the House of Lords it was considered that this point did not arise, as the difficulty existed in regard to the entire dock and all the berths in it. The question was whether, having regard to *the tidal conditions of the port,* there had been any unreasonable delay in the loading."

As for *Evans v. Blair,* we expressly admitted that its dicta could be used against us (where the charter contained the words "as ordered"), and for that reason we considered it especially valuable as showing the limits of the rule. The language of Judge Putnam on page 619 of the opinion, and the decision of the case itself in favor of the shipowner, show that the option given to the charterer is not an arbitrary one and the language of Lord Esher (in the Court of Appeal) in *Carlton S. S. Co. v. Castle* is quoted with approval. It is interesting to compare the discharge of the "Lewis S. Goward" in *Evans v. Blair* with the discharge of "Craighill" in Oakland, although the cargo of this latter vessel had been also sold by the respondent to the Western Fuel Company.

Subheading F. Most of the arguments under this heading have already been met. "The little schooner

'Lunsmann' ", as counsel calls her, carried a cargo almost as large as the "Columbia's". She discharged *some* cargo, and it does not seem to us to matter how much, at the Western Fuel Company's bunkers on February 22nd and was finally discharged at Oakland on March 4th (Mainland, 62, 64). Yet she arrived a week after the "Columbia". It is true that holidays do not count as lay days, but they do count after the lay days have run and, furthermore, this seems to us a poor excuse for discharging a vessel out of turn. It is also significant that the "Lunsmann" was discharged *16 days* before the "Columbia". This hardly squares with counsel's remarks as to "the general conditions of the harbor" and again illustrates the point that it was only at the bunkers of a particular concern that the long delays took place.

We respectfully submit that respondent has failed to meet the case made out by the libelants.

Dated: San Francisco,
March 21st, 1910.

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Proctors for Appellants.

Note: The citations on pages 42 & 51 of Appellants' main brief should be Carver, Section 627 instead of Carver, Section 623.